88-810

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In The

# Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
*Petitioner,*

v.

DONALD R. PARKER, *et al.*,
*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

FREDERICK D. COOKE, JR.
*Corporation Counsel, D.C.*

*CHARLES L. REISCHEL,
*Deputy Corporation Counsel, D.C.*
*Appellate Division*

DONNA M. MURASKY,
*Assistant Corporation Counsel, D.C.*

Attorneys for Petitioner
Room 305, District Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

## QUESTIONS PRESENTED

I. Whether the District of Columbia may be held liable under 42 U.S.C. § 1983 because it permits its police officers to use deadly force against suspected felons believed to pose an imminent threat of serious physical harm to themselves or others even when these officers do not see a weapon.

A. Whether the District was entitled to a jury instruction that a police officer, consistently with the Constitution, may use deadly force when he reasonably believes there is an imminent threat of serious physical harm to himself or others, in a case in which the plaintiff claimed that a reasonable training policy should teach police officers not to shoot a suspected felon believed to be reaching for a weapon until they see a weapon.

B. Whether the District failed to preserve its objection to the trial court's unequivocal refusal to give its requested instruction simply because the District, in compliance with the trial court's directive to state only new objections to the instructions after they were given, did not reiterate its objection just before the jury retired to deliberate.

II. Whether the District may be held liable under 42 U.S.C. § 1983 for a police officer's split-second decision to shoot a suspected felon, based on District training policies that neither directed unconstitutional actions nor were deliberately indifferent to the use of unconstitutional deadly force and that, at most, had only a "but for" relationship to the officer's decision to shoot.

## PARTIES

In the court of appeals, the parties were Donald R. Parker, Betty Parker, and the District of Columbia.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| I. THE UNDERLYING EVENTS. | 2 |
| II. THE TRIAL | 4 |
| III. THE JURY VERDICT | 10 |
| IV. THE MOTION FOR JUDGMENT NOV | 10 |
| V. THE APPEAL | 12 |
| REASONS FOR GRANTING THE WRIT | 15 |
| I. WHEN A JURY MUST DECIDE WHETHER A GOVERNMENT'S POLICY IS UNCONSTITUTIONAL AND WHETHER A CONSTITUTIONAL TORT HAS BEEN COMMITTED, THE JURY SHOULD BE TOLD WHAT THE CONSTITUTIONAL STANDARD IS. | 18 |
| II. WHEN A TRIAL COURT CLEARLY REFUSES TO GIVE A JURY INSTRUCTION AND STATES THAT THE ISSUE IS PRESERVED FOR REVIEW, IT MAY BE RAISED ON APPEAL EVEN IF A PARTY, IN COMPLIANCE WITH THE TRIAL COURT'S DIRECTIVE, DOES NOT LODGE A REPETITIVE OBJECTION AFTER THE INSTRUCTIONS ARE GIVEN | 20 |
| III. NO DISTRICT TRAINING POLICY DELIBERATELY INDIFFERENT TO THE UNCONSTITUTIONAL USE OF DEADLY FORCE WAS THE MOVING FORCE OF PARKER'S INJURIES. | 22 |
| CONCLUSION | 29 |

## TABLE OF AUTHORITIES


Page

CASES

Cameo Convalescent Center v. Senn, 738 F.2d 836 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) 21

Cameron v. City of Pontiac, Michigan, 813 F.2d 782 (6th Cir. 1987) . . . . . 25

Canton, Ohio v. Harris, No. 86-1088 (S. Ct.) (argued on Nov. 8, 1988) . . . . . 17, 29

Cohen v. Franchard Corp., 478 F.2d 112 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973) . . . . . 21

Daniels v. Williams, 474 U.S. 327 (1986) . . . . . 27

Davidson v. Cannon, 474 U.S. 344 (1986) . . . . . 27

Deshaney v. Winnebago County Dept. of Social Services, No. 87-154 (S. Ct.) (argued Nov. 2, 1988) 29

Dunn v. St. Louis-San Francisco Ry, 370 F.2d 681 (10th Cir. 1966) . . . . . 22

Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1384 (1987) 17

Ford v. Childers, 885 F.2d 1271 (7th Cir. 1988) . . 19

Goostree v. Tennessee, 796 F.2d 854 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1374 (1987) . . . . . 21

Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982) . . . . . 17

Lang v. Texas & P. Ry, 624 F.2d 1275 (5th Cir. 1980) 21

Martinelli v. City of Beaumont, 820 F.2d 1491 (9th Cir. 1987) . . . . . 22

Martinez v. California, 444 U.S. 277 (1980) . . . . . 26

Meitz v. Garrison, 413 F.2d 895 (8th Cir. 1969) . . 22

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) . . . . . *passim*

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) . . . 20, 23, 24, 27

Patzner v. Burkett, 779 F.2d 1363 (8th Cir. 1985) 17

St. Louis v. Praprotnik, 108 S. Ct. 915 (1988) . . . 21

TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| Stewart v. Ford Motor Co., 553 F.2d 130 (D.C. Cir. 1977) | 22 |
| Tennessee v. Garner, 471 U.S. 1 (1985) | *passim* |
| **CONSTITUTIONAL AND STATUTORY PROVISIONS** | |
| U.S. Const. Amend. V | 2, 9 |
| 28 U.S.C. § 1254(1) | 2 |
| 42 U.S.C. § 1983 | *passim* |
| **OTHER AUTHORITIES** | |
| Fed. R. Civ. P. 51 | 12, 16, 20-22 |
| Wright, Miller & Elliott, Federal Practice and Procedure (Civil) 2d, §§ 2553, 2554 (1971 & 1987 Supp.) | 22 |

In The

# Supreme Court of the United States

OCTOBER TERM, 1988

---

DISTRICT OF COLUMBIA,
*Petitioner,*

v.

DONALD R. PARKER, *et al.*,
*Respondents.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

The District of Columbia petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The June 17, 1988, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-43a) is reported at 850 F.2d 708. The August 18, 1988, orders denying the petition for rehearing (App. 62a) and the suggestion for rehearing *en banc* (App. 63a) are not reported.

The opinion of the United States District Court for the District of Columbia (App. 44a-60a), issued on January 29, 1987, is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1988. App. 61a. On July 18, 1988, the District of Columbia filed a timely petition for rehearing and a suggestion for rehearing *en banc*. On August 18, 1988, the petition for

rehearing was denied, and an equally divided court denied the suggestion for rehearing *en banc*. App. 62a, 63a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Constitutional Provision.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .." U.S. Const. Amend. V.

### B. Statutory Provision.

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of . . . the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . ., shall be liable to the party injured . . .."

## STATEMENT OF THE CASE

## I. THE UNDERLYING EVENTS.

### A. The Decision to Shoot.

This case arises from a split-second decision by a District of Columbia police officer, William Hayes, Jr., to shoot Donald R. Parker, who was wanted on a felony warrant for armed robbery. The shooting occurred after Parker, who had stated that he would accompany Officer Hayes and his partner to the police station, decided to flee. During the chase that ensued, Parker jumped into an automobile being driven by an innocent motorist, shoved her onto the passenger seat, and grabbed the steering wheel. Officer Hayes shot only after attempting unsuccessfully to extricate Parker from the automobile; issuing warnings to Parker to freeze; being

threatened by Parker ("Fuck you. I'm gonna . . . ."); and observing Parker reach for his waistband. Officer Hayes shot Parker in the belief that Parker was reaching for a gun and that his life and that of the would-be kidnap victim were in danger. Parker, who turned out not to be armed, was seriously wounded.

**B. Other Events Preceding the Shooting.**

Although Officer Hayes and his partner were District police officers, the events just described took place in Prince George's County, Maryland. Officer Hayes and his partner had been dispatched to Maryland to interview Mrs. Parker because the District had been unable to ascertain Parker's whereabouts. The District hoped that Mrs. Parker, who was believed to be estranged from her husband, could supply this information.

It was only after Officer Hayes and his partner had knocked on the door of Mrs. Parker's home and had spoken to her that they unexpectedly encountered Parker himself. Parker invited them inside, and a lengthy conversation ensued. Officer Hayes explained to Parker that he was wanted on an arrest warrant for armed robbery and that his suspected accomplice, one Clarence Johnson, Jr., had been arrested two weeks earlier. Parker, in turn, announced that he had shot Johnson "five or six times" in a dispute over money. Eventually, the officers persuaded (or thought they had persuaded) Parker to go with them voluntarily. When they permitted Parker to go into his bedroom to dress, however, Parker leaped through a window and set in motion the events that culminated in his being shot.

**C. Officer Hayes and the Repeat Offender Project.**

Officer Hayes and his partner were members of the Repeat Offender Project (ROP), a unit of the District's Metropolitan Police Department (MPD). The ROP had been established some six months before the shooting as part of a concerted effort to identify and apprehend individuals believed to be

committing a disproportionate number of serious crimes in the District. The unit was composed of experienced police officers selected from applicants throughout the Department by the head of the ROP, Inspector Spurlock.

Despite the composition of the ROP, the MPD conducted an intensive week-long training and review program before the unit became operational. This program included instruction on the authority of MPD officers to arrest outside the District and the need to notify local law enforcement agencies whenever an MPD officer reasonably expects to effect an extrajurisdictional arrest so that local law enforcement officers can participate.

## II. THE TRIAL.

After the shooting, Parker sued the District of Columbia and the two police officers in the United States District Court for the District of Columbia and contended that his injuries were the result of a variety of constitutional and District-law violations.[1] As the proceedings unfolded, Parker dismissed the officers as defendants and narrowed his claims against the District to two: (1) a common law claim of assault and battery; and (2) a due process claim arising under the Fifth Amendment to the United States Constitution.

In the case of the due process claim, Parker sought to hold the District liable for failing to train its police officers not to use deadly force unless they *see* a weapon in the hands of an adversary. In addition, he urged that the District should be faulted for a number of other alleged training, supervision, and disciplinary deficiencies, including: (1) inadequate "disarmament" or "hand-to-hand" combat training; (2) inadequate training in extrajurisdictional arrest authority; (3) inadequate supervision of Officer Hayes'

---

[1] Mrs Parker, who sought damages for loss of consortium, was also a plaintiff.

physical fitness; and (4) its failure to discipline Officer Hayes after the shooting.[2]

**A. The Evidence.**

**1. Training in the Use of Deadly Force and Disarmament Training.**

The sharpest factual dispute at trial was over the circumstances in which a police officer may permissibly use deadly force. One of Parker's experts, Roy C. McLaren, articulated a standard for the permissible use of deadly force that was, and is, sharply at odds with constitutional standards and District policy. In addition, Mr. McLaren and another of Parker's experts, Alan Bates, indicated that Officer Hayes should have been able to subdue and disarm Parker and that his training in this respect was inadequate.

Thus, Mr. McLaren testified that "a reasonably careful and prudent training program" should teach police officers not to use deadly force unless they see a weapon in the hands of an adversary. He also testified that Officer Hayes had acted improperly when he fired at Parker because he did not see a gun in Parker's hand. In his view, "You must see a gun in order to make sure that there is an actual threat to yourself or someone else."

By contrast, the District introduced uncontradicted evidence of its use-of-deadly-force policy, a policy that complies with *Tennessee v. Garner*, 471 U.S. 1 (1985), but not with Mr. McLaren's views. The District has long had a policy that permits the use of deadly force only in the most extraordinary of circumstances, *i.e.*, when a police officer reasonably believes that a person poses an imminent threat of serious physical harm to himself or to a third person. The District

[2] As the case has evolved, the alleged training deficiencies have assumed greater importance than the alleged supervisory and disciplinary deficiencies. Accordingly, the District, in this petition, highlights the alleged training deficiencies. It notes, however, that the reasons why liability under 42 U.S.C. § 1983 cannot be imposed for the alleged training deficiencies, enumerated as (1) and (2), apply with equal force to the alleged supervisory and disciplinary deficiencies.

also introduced uncontradicted evidence that this policy was communicated to, and understood by, its police officers including Officer Hayes. Officer Hayes, in turn, admitted that he did not see a weapon, but he also testified that he believed that Parker, who had ignored his warnings, was reaching for a gun and thus posed an imminent threat of serious harm to himself, the driver of the automobile into which Parker had jumped, or both of them. In those circumstances, Officer Hayes understood that District policy permitted him to shoot.

In addition, Mr. McLaren commented on Officer Hayes' deposition testimony that he had received one hour, or "next-to-nothing," in disarmament training, *i.e.*, hand-to-hand combat. According to Mr. McLaren, "assuming that" Officer Hayes "only had two 30-minute sessions in defensive tactics, disarmament tactics, disarming tactics, that would be inadequate." Mr. Bates, in turn, testified that Officer Hayes should have been able to subdue Parker at the time he attempted to extricate Parker from the automobile.

The District, in turn, introduced uncontradicted evidence of its actual training in subduing and disarming dangerous suspects. Inspector Spurlock testified about the District's extensive training, including verbal and physical instruction, in subduing and disarming dangerous suspects. Officer Hayes confirmed his own training in these respects and related several instances in which he had put this training to use by single-handedly subduing dangerous suspects. Here, however, after Parker had slipped from his grasp and appeared to be reaching for a weapon, he understood that he was under no duty to engage in hand-to-hand combat with Parker in an attempt to disarm him. The District, in order to protect the lives of its police officers (as well as the lives of innocent third persons) from unnecessary risks, does not encourage them to engage in hand-to-hand combat with persons who are believed to be armed and dangerous. Instead, a District police officer is instructed to engage in such con-

duct "only as a last resort if for some reason an officer c[an] not use the threat implicit in his service revolver." App. 38a (Williams, J., dissenting).

**2. Training in Extrajurisdictional Arrest Authority.**

On this aspect of the case, Parker focused his attention on a memorandum prepared by Inspector Spurlock, the head of the ROP, after the week-long ROP training session, and on the testimony of Officer Hayes' partner. The memorandum, which was distributed to ROP officers, summarized the authority of MPD officers to arrest suspects in Maryland and Virginia. One of Parker's experts, Roy C. McLaren, testified that a reasonably intelligent police officer, who read the memorandum, would not understand the scope of his authority to arrest in Maryland. In addition, Officer Hayes' partner testified that he was uncertain of his arrest authority during the time he was in the Parker home.

The District's evidence was largely supplementary. Former Assistant U.S. Attorney (AUSA) Bowman, who assisted in training the ROP, testified that the memorandum could be subject to a number of interpretations, such as permitting an arrest for any felony, or only for felonies and misdemeanors committed in a police officer's presence. In the last instance, however, former AUSA Bowman testified, the memorandum would have been "overly restricted" because a District police officer in Maryland is permitted to arrest for a felony not committed in his presence.

The District also introduced other evidence of the training given ROP officers concerning their extrajurisdictional arrest powers. Inspector Spurlock, who attended the entire week-long ROP training session, testified that there was considerable attention given to extrajurisdictional arrest powers. Former AUSA Bowman agreed and testified that he had personally instructed ROP officers that: (1) they had the power to arrest in Maryland on a felony warrant; (2) "a District of Columbia police officer who was operating in the state of

Maryland had the power to arrest for a felony, even if not committed in his presence, for which he had probable cause;" and (3) a felony warrant issued by a judicial officer was sufficient to establish probable cause.

In addition, both Officer Hayes and his partner testified that they had received instruction concerning extrajurisdictional arrest powers during the week-long ROP training session and before joining the ROP. Furthermore, Officer Hayes testified that he had made several extrajurisdictional arrests in conjunction with local police in the six-month period preceding the Parker shooting. His partner also testified that he had made extrajurisdictional arrests.

Finally, the District introduced uncontradicted evidence that its police officers are instructed to notify local authorities whenever they reasonably expect to make an extrajurisdictional arrest so that local police officers can participate. Here, however, Officer Hayes and his partner did not expect to find Parker at home, based on their information that the Parkers were estranged.[3]

**B. Trial Motions and Jury Instructions.**

The District moved for a directed verdict on each of Parker's claims, once at the close of his case, and again at the close of all the evidence. In support of the motions, the District urged, *inter alia*, that Officer Hayes' decision to shoot was constitutionally permissible under *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, this Court, in consider-

[3] The evidence also established that the police officers unexpectedly lost radio communication upon arriving at the Parker home and that the Parker telephone had been disconnected, a fact that the officers learned only after they were in the house. Had either the radio or the Parker telephone been available, Officer Hayes and his partner could have called upon local police authorities for assistance. As matters stood, however, these officers, well aware of the potential for domestic violence (their information was that the Parkers were estranged) and/or flight should they simply walk away, undertook to persuade Parker to accompany them to the station voluntarily.

ing the circumstances in which a police officer may use deadly force to prevent the escape of a suspected felon, ruled: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11.[4] Here, Parker, who was on parole for one armed robbery and who was wanted on a warrant for another armed robbery, was shot while he in the process of stealing an automobile and kidnapping its innocent driver and as he appeared to be reaching for a weapon. In addition, the District urged that its training policy on the use of deadly force was not unconstitutionally flawed. The trial court (Joyce Hens Green, J.) denied the motions.

Before the closing arguments and submission of the case to the jury, the District asked for a jury instruction based on *Garner* to ensure that the jury understood its task on the constitutional claim.[5] The instruction was particularly important in view of Parker's expert testimony, which contradicted District policy as well as *Garner*.

---

[4] Although Parker's constitutional claim was based on the Due Process Clause of the Fifth Amendment and *Garner* is a decision construing the Fourth Amendment, *Garner* is dispositive in the circumstances of this case. If the District's policy and training on the use of deadly force satisfy *Garner*, they necessarily must satisfy the Due Process Clause. Concomitantly, if Officer Hayes' use of deadly force was reasonable, and therefore permissible under *Garner*, his action cannot be deemed "shocking" under the Due Process Clause.

[5] The instruction the District tendered stated in part:

> . . . [I]t is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm, either to the officer or to others. It is also constitutional for an officer to use deadly force in apprehending a suspect, if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, if, where feasible, some warning has been given.

The trial court declined to give the *Garner* instruction. The District renewed its request following the closing arguments. The closing arguments on behalf of Parker repeatedly emphasized the so-called expert testimony that a training program should teach "that it is not reasonable for a police officer to shoot when he does not see a weapon;" that the District's policy differed from these expert views; and that Officer Hayes "had not seen a gun" before shooting. Those arguments also emphasized Officer Hayes' deposition testimony that he had received "next-to-nothing" in disarmament training. The trial court again refused to give the instruction and remarked that its decision would "make an interesting appeal." The court then instructed the jury. Following those instructions, the court expressly ordered counsel to raise only new objections to them. The District, after initially attempting to reiterate an objection and being cautioned again by the trial court, complied with the court's directive.

## III. THE JURY VERDICT.

The jury found in favor of the District on the common law claim of assault and battery and expressly answered "No" to the question whether "Officer Hayes used unreasonable and excessive force" in shooting Parker. The jury also found that "the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law." It awarded Parker $425,046.67 in damages.[6]

## IV. THE MOTION FOR JUDGMENT NOV.

The District moved for judgment notwithstanding the verdict on the constitutional claim. In denying the motion, the trial court ruled that there was sufficient evidence to establish that the District had a policy of inadequate training that was deliberately indifferent to the use of excessive

---

[6] Mrs. Parker was awarded $1.00 for loss of consortium.

force and that this policy caused Parker's injury. The court explained:

> That is, the jury . . . could have found when examining *only* Officer Hayes' actions that his conduct was not unreasonable given the particular conditions at the time of the shooting, his attested and supported assertions of self defense, and his own lack of training. When assessing the culpability of the District of Columbia, however, the jury could reasonably have found *that the shooting was symptomatic of a city policy that was deliberately indifferent to the use of excessive force, and hence constituted a constitutional violation when judged against the standard for officers properly trained in extrajurisdictional emergencies.* In short, activity that might not seem "shocking" when evaluated against the expectations one might hold for an untrained officer, could well appear "shocking" when evaluated against *a standard of training and safety that the jury could have concluded the municipality reasonably should have provided.*

App. 48a n.5 (emphasis added). There was also, according to the trial court, sufficient evidence of a District policy because Parker had established "that police officers in the ROP unit received 'next to nothing' in disarmament tactics *and* extrajurisdictional arrest procedures." App. 55a (emphasis added).[7]

The court also ruled that the jury could have "reasonably conclude[d] that lack of training was *responsible* for the incident," in that Parker's "experts testified that ROP members received inadequate training in disarmament and extrajurisdictional arrest procedures." App. 59a-60a (emphasis added).

---

[7] As noted previously, however (*supra* at 6), Officer Hayes' "next-to-nothing" testimony was directed at "disarmament" training, which he understood to mean training in hand-to-hand combat like that he had received in the military. He certainly did not testify that he received "next-to-nothing" in training about extrajurisdictional arrest procedures.

## V. THE APPEAL.

A sharply divided panel affirmed.[8] In brief compass, the majority ruled that the trial court had properly refused to give the *Garner* jury instruction, setting forth the circumstances in which a police officer may, consistently with the Constitution, use deadly force. According to the majority, the instruction need not have been given because the District's policy respecting the use of deadly force, Officer Hayes' understanding of that policy, and his reasons for shooting were not at issue. It also explained that, in any event, the instructions given on the use of excessive force on the common law claim — in which the jury had entered a verdict for the District — were adequate.[9]

The majority, construing Fed. R. Civ. P. 51, also ruled, *sua sponte*, that the District had failed to preserve for appellate review its objection to the denial of the *Garner* instruction. In support of its ruling, the majority explained:

> Rule 51 . . . sets forth the procedure for effectively preserving challenges to jury instructions: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its ver-

---

[8] Senior District Judge Myron L. Gordon of the United States District Court for the Eastern District of Wisconsin, sitting by designation, wrote an opinion in which Judge Abner J. Mikva joined. (App. 1a-14a). Judge Stephen F. Williams dissented. (App. 15a-43a).

[9] The court stated (App. 13a (emphasis in original)):

> What the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge. That Officer Hayes may have believed that he was being threatened, and that he did, in fact, issue an oral warning to Mr. Parker to "freeze," does not dispose of this aspect of the appeal. The jury was charged with evaluating the adequacy of the District['s] police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem [the] . . . instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law . . ..

> dict, *stating distinctly the matter objected to and the grounds of the objection.*" . . . The District failed to adhere to Rule 51; it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate.

App. 13a-14a (emphasis supplied by the court).

Finally, the majority ruled that there was sufficient evidence to permit liability to be imposed on the District consistently with *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny. According to the majority, the jury could have credited the evidence that the District had inadequately trained its police officers about extrajurisdictional arrest authority and "disarmament training." App. 9a. The jury could also have concluded that inadequate training in extrajurisdictional arrest authority contributed to a "confused atmosphere" that resulted in the shooting. App. 11a. In addition, it ruled that the District could be held liable because the jury could have concluded that Officer Hayes was not in peak physical condition. Finally, the majority pointed to the District's failure to discipline Officer Hayes after the shooting. App. 9a-l0a.

Judge Williams dissented. In his view, the *Garner* jury instruction should have been given "[i]n view of the drastic gap between the law under *Garner* and McLaren's testimony" and "[t]o prevent the jury from adopting McLaren's standard as its constitutional benchmark . . . ." App. 22a, 21a. Judge Williams also would have ruled that the District preserved this issue for appellate review, given the District's request for the *Garner* instruction, the trial court's considered refusal to give the instruction, and the trial court's directive to raise only new objections to the instructions after they were given. He explained: "I cannot grasp why the court now faults the District for having refrained from a repetition that would have defied the judge's instructions and likely have been contemptuous. To do so is not to preserve orderly trial procedures but to invite their disruption." App. 22a.

Judge Williams noted his agreement with one aspect of the majority opinion, that part of the opinion which indicated that "a municipality should be held liable under § 1983 for unconstitutional acts resulting from inadequate police training only if its training policies reflect "deliberate indifference to those violations . . . ." App. 23a. However, because this Court has yet to rule whether "deliberate indifference" is the standard in cases based on an inadequate training policy, not itself unconstitutional, Judge Williams carefully canvassed the decisions of this Court to demonstrate why this standard is proper. App. 24a-31a. Furthermore, because "it is facts that give words their meaning" (App. 23a), Judge Williams then scrupulously applied the lessons of this Court's decisions to each of alleged deficiencies that had been identified by Parker. App. 33a-43a. By contrast, the majority had combined "distinct liability theories in a vague § 1983 goulash" and had thus "render[ed] the concept of deliberate indifference meaningless and trivialize[d] the causation requirement." App. 33a.

Judge Williams determined that, in some instances, there was no deficiency. In other instances, he determined that any causal link between an alleged training deficiency and the shooting was either non-existent or too attenuated. Thus, for example, Parker's claim that his injuries were caused by inadequate training in extrajurisdictional arrest authority "out-*Palsgrafs Palsgraf*." App. 35a. In the case of Parker's claim based on inadequate "disarmament" training, Judge Williams observed that "[a]t no time did Parker's experts in fact review or analyze the District's training policy, much less assess it as inadequate." App. 38a. He concluded by stating that, even "assum[ing] training errors and a sufficient causal link between them and Parker's injury, there is simply no evidence — from a pattern of excessive constitutional violations or anything else — from which a jury could reasonably infer that [the District's] . . . decisions reflected deliberate indifference to increased risks of such violations." App. 43a.

Subsequently, the District filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The petition for rehearing was denied by a two-to-one vote; and the suggestion for rehearing *en banc* was denied by an evenly divided court. App. 62a, 63a.[10]

## REASONS FOR GRANTING THE WRIT

The panel majority in this case made at least three erroneous rulings that warrant review by this Court.

I. The majority erroneously ruled that the trial court properly refused to give a jury instruction defining when a police officer may constitutionally use deadly force. It thereby upheld the jury's verdict even though the verdict may have been based on an expert's opinion — that a police officer may use deadly force *only when he sees a weapon in the hands of an adversary* — considerably more restrictive than the constitutional standard established in *Tennessee v. Garner*, 471 U.S. 1 (1985). The failure to give a *Garner* instruction disabled the jury from assessing the constitutionality of Officer Hayes' action and the District's policy on when deadly force may be used.

Review of this ruling is necessary to ensure that municipalities are not found liable under *Monell* for training policies and police actions that *comply* with the Constitution. Review is also necessary to ensure that police officers are not required to risk their lives unnecessarily. To avoid liability under 42 U.S.C. § 1983, the District should not be required to train its police officers to use deadly force only if they *see* a weapon in a suspect's hands. Such a policy would needlessly permit criminals to kill or to inflict serious bodily injury on police officers.

II. The majority erred in ruling that the District did not preserve for appellate review its objection to the denial of

---

[10] The court of appeals split five-to-five on the suggestion for rehearing *en banc*; Judge Douglas H. Ginsburg did not participate. App. 63a.

the *Garner* instruction. Here, the District proposed, and the trial court rejected, an instruction based on *Garner*. Furthermore, the trial court expressly indicated that the point was preserved for appeal, and, after instructing the jury, directed the parties to raise only new objections to the instructions. The ruling of the majority that the District did not preserve for review its request for the *Garner* instruction is wrong and is squarely at odds with numerous decisions of other U. S. Courts of Appeals. Review is necessary to ensure a sensible and uniform construction of Fed. R. Civ. P. 51.

III. In its rulings on the claims of inadequate training, the majority eviscerated the limits on governmental liability established by this Court. Thus, although the majority seemed to recognize that *Monell* permits liability to be imposed only when a government policy or custom is the "moving force" of the constitutional injury asserted, the majority found the District liable based on what, at best, was a "but for" relationship between the asserted deficiencies in its training of police officers and the shooting here. Furthermore, *Monell* requires that a constitutional injury be fairly attributable to a municipality. The majority, although purporting to hold that *Monell* requires that a training policy, not itself unconstitutional, be deliberately indifferent to constitutional violations, did not, in fact, require any such evidence. Instead, the alleged defects in training it identified deal with matters that create little or no risk that deadly force will be used in violation of the Constitution.

These aspects of the majority's decision must be reviewed to ensure that the limitations on governmental liability established in, or flowing from, *Monell* are not rendered illusory in practice. The ruling below is inconsistent with this Court's determination that "but for" causation cannot be a "moving force." It is also inconsistent with *Monell's* central meaning that a municipality may be held responsible under 42 U.S.C. § 1983 only when it may fairly be said that

the municipality has made a conscious choice to adopt a policy or custom that causes unconstitutional harm.[11]

Review is also appropriate because this Court has not definitively established the strength of the causal connection required by *Monell*; and the majority's decision finding a sufficient causal connection here squarely conflicts with a decision of the Sixth Circuit. Furthermore, assuming, *arguendo*, that a municipality may be held liable under *Monell* for injuries caused by an allegedly inadequate training policy not itself unconstitutional, this Court has not yet adopted a standard or established guidelines setting forth the circumstances in which a municipality may fairly be held responsible for a constitutional tort caused by such a policy.[12]

This case presents an appropriate vehicle for this Court to begin to resolve these important questions in the context of law enforcement training policies. The lower courts have struggled for years, with varying results, to define the contours of *Monell* in this context. Guidance from this Court is needed.

* * * *

---

[11] The issue whether a municipality may ever be held liable for an allegedly inadequate training policy, not itself unconstitutional, is pending in this Court in *Canton, Ohio v. Harris*, No. 86-1088 (argued on Nov. 8, 1988). See *infra* note 22.

[12] In the absence of a definitive ruling, numerous courts have held that a municipality may be held liable only upon proof of a municipal policy or established custom deliberately indifferent to constitutional violations. *See, e.g., Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2d Cir. 1986) ("deliberate indifference"), *cert. denied*, 107 S. Ct. 1384 (1987); *Hays v. Jefferson County*, 668 F.2d 869 874 (6th Cir.) (training must be so reckless or grossly negligent that police misconduct almost inevitable), *cert. denied*, 459 U.S. 833 (1982); *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985) ("deliberate indifference"established by training so grossly negligent "that police misconduct inevitably occurs").

## I. WHEN A JURY MUST DECIDE WHETHER A GOVERNMENT'S POLICY IS UNCONSTITUTIONAL AND WHETHER A CONSTITUTIONAL TORT HAS BEEN COMMITTED, THE JURY SHOULD BE TOLD WHAT THE CONSTITUTIONAL STANDARD IS.

The majority ruled that the District was not entitled to a jury instruction setting forth the circumstances in which it is constitutionally reasonable for a police officer to use deadly force. The majority did so, even though the failure to give such an instruction permitted the jury to find the District liable for its training on the use of deadly force under a standard, articulated by one of Parker's experts, that is sharply at odds with constitutional standards.

The majority, in upholding the denial of the *Garner* instruction, nowhere even acknowledged the disparity between the views of Parker's expert, on the one hand, and the constitutional standard established by *Garner* and the District's policy, on the other. It failed to do so, even though the expert's views and the District's evidence of its policy produced the sharpest factual dispute at trial. Instead, inexplicably the majority held that the instruction need not have been given because the District's official policy, Officer Hayes' understanding of that policy, and his reasons for shooting were not at issue in this case. It also explained that, in any event, the instructions given on the use of excessive force on the common law claim were adequate.

The majority's reasoning is wrong. First, the constitutionality of the District's official policy and its training governing the use of deadly force *were* presented to the jury, by Parker's expert, by the District's witnesses, and by the closing arguments. Second, the jury was asked to decide whether Parker's injury was a constitutional tort, *i.e.*, whether Officer Hayes' use of deadly force was or was not constitutional in the circumstances. Despite its task on the constitutional claim, however, the jury was not instructed on the *constitutional* standard governing the use of deadly force. As a result, the jury could not intelligently assess the constitu-

tionality of the District's policy or of Officer Hayes' decision to shoot. Also as a result, the jury was permitted to impose liability based on the policy deemed "reasonable" by one of Parker's experts, a policy far more restrictive than the constitutional standard set forth in *Garner,* which the District's policy satisfies.[13] *Compare Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (police officer may shoot fleeing bank robbery suspect who appears to be armed).

The fact that the jury was instructed on the circumstances that permit the use of deadly force under the common law—in connection with the common law count of assault and battery—does not cure the deficiency in the instructions on the constitutional count. On the contrary, if the jury had been properly instructed on the circumstances in which the Constitution permits the use of deadly force—which are virtually the same as those which permit deadly force to be used under the District's common law standard about which it was instructed—there is every reason to believe that the jury, which rendered a verdict in favor of the District on the common law claim, would also have found in favor of the District on the constitutional claim.[14]

---

[13] This expert's opinion is also sharply at odds with the law in numerous jurisdictions, and with police department policies throughout the country, as described by this Court with approval in *Garner*. *See Garner, supra,* 471 U.S. at 15, 17-19.

[14] The jury instructions and verdict form quite plainly distinguished between the common law count and the constitutional count. As a result, the deficiency in the instructions on the constitutional count could not be remedied by a proper instruction on the common law count. On the contrary, the instruction on common law count and the absence of a comparable instruction on the constitutional count may have lead the jury to infer that two different rules applied to the facts.

On the common law count, the jury was told:

> A police officer is entitled to use reasonable force in defense of himself or in defense of another. However, a police officer is not entitled to use unreasonable or excessive force. The use of excessive force that is, *any greater force than the police officer had reasonable grounds to believe and actually did believe to be necessary* under the circumstances constitutes an assault and battery.

(Emphasis added). By contrast, no comparable instruction delineating the circumstances in which force would be deemed reasonable, and thus a training policy permissible, was given on the constitutional count.

The decision of the majority that the *Garner* instruction need not have been given is at odds with the virtually unanimous judgment of this Court in *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985). In *Tuttle,* seven Justices agreed that, when jury instructions permit liability to be imposed on a constitutionally untenable theory, reversal is required even if the evidence might otherwise support a finding of liability by a properly instructed jury. *Id.* at 821-22 (plurality op.); *id.* at 830-33 (Brennan, J., concurring).

## II. WHEN A TRIAL COURT CLEARLY REFUSES TO GIVE A JURY INSTRUCTION AND STATES THAT THE ISSUE IS PRESERVED FOR REVIEW, IT MAY BE RAISED ON APPEAL EVEN IF A PARTY, IN COMPLIANCE WITH THE TRIAL COURT'S DIRECTIVE, DOES NOT LODGE A REPETITIVE OBJECTION AFTER THE INSTRUCTIONS ARE GIVEN.

The District tendered a *Garner* instruction and specifically renewed its request for this instruction immediately after closing arguments to the jury and just before it was instructed. In refusing to give this instruction, not once but twice, the trial court plainly made a considered and final judgment that the *Garner* instruction should not be given. Indeed, the court even remarked that its decision not to give the instruction would "make an interesting appeal." Finally, after the instructions were given, the court expressly ordered counsel to raise only new objections to them.

The *sua sponte* ruling of the majority that the District nevertheless failed to preserve its objection is wrong. The purpose of Fed. R. Civ. P. 51 is to give adequate notice to the trial court of deficiencies in the jury instructions so that these deficiencies may be remedied in a timely fashion—before the jury retires to deliberate. Here, the District proffered its instruction not once but twice, and the trial court, which had already been apprised of the District's legal theory

in its two motions for a directed verdict, expressly indicated that its denial of the *Garner* instruction was preserved for review. In these circumstances, Rule 51 should not be interpreted as requiring counsel to ignore a trial court's express directive to raise only new objections to the jury instructions after they have been given. The majority's decision that this issue was not preserved will require pointless formalistic objections; waste the time of the trial courts; and generate numerous disputes in the appellate courts over the sufficiency of objections to jury instructions.[15]

Review of the majority's ruling that the District did not comply with Rule 51 is necessary, not only because it is wrong, but also because it conflicts with numerous other decisions by the U.S. Courts of Appeals. Those decisions hold that, when a trial court clearly rejects a proffered jury instruction, further objection is unnecessary to preserve the point for appeal. *See, e.g., Cohen v. Franchard Corp.*, 478 F.2d 115 (2d Cir.) (no need for objection after jury charge where court was fully informed of party's contention in advance of charge and it was clear that further efforts to persuade the court would have been unavailing), *cert. denied*, 414 U.S. 857 (1973); *Lang v. Texas & P. Ry*, 624 F.2d 1275, 1279 (5th Cir. 1980) (Under Rule 51, "the failure to object may be disregarded if the party's position has previously been made clear to the court and it is plain that a further objection would have been unavailing"); *Goostree v. Tennessee*, 796 F.2d 854, 862-63 n.3 (6th Cir. 1986) (when trial court specifically refused to include proposed instruction, party may assign refusal as error on appeal even if party did not object to instructions as given), *cert. denied*, 107 S. Ct. 1374 (1987); *Cameo Convalescent Center v. Senn*, 738

[15] Contrary to the suggestion in the majority opinion (App. 14a), nothing in *St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), supports its ruling. In *Praprotnik*, the complaining party, in contrast to the District, "*agree[d]*, both in its motions and proposed instructions, with its opponent's view of the law." *Id.* at 946, (Stevens, J., dissenting) (emphasis in original). Even then, this Court reviewed the assigned error.

F.2d 836, 842 (7th Cir. 1984) (written submission objecting to trial court's refusal to give jury instruction, filed after conference on instructions, sufficient to preserve issue for appeal), *cert. denied*, 469 U.S. 1106 (1985); *Meitz v. Garrison*, 413 F.2d 895 (8th Cir. 1969) (when party twice objected to jury instruction at conclusion of the evidence and set forth the grounds of objection, review is proper even though party did not object to instructions after they were given before jury retired); *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987) (where party has proposed alternative instruction and court is fully aware that party does not agree with instructions as given, no need to object specifically to instructions after they are given).[16] *Compare Dunn v. St. Louis San Francisco Ry*, 370 F.2d 681, 683-84 (10th Cir. 1966) (requiring literal compliance with Rule 51 irrespective of circumstances). *See generally*, Wright, Miller & Elliott, Federal Practice and Procedure (Civil) 2d, §§ 2553, 2554 (1971 & 1987 Supp.) (discussing with approval approach taken by majority of U.S. Courts of Appeals).

## III. NO DISTRICT TRAINING POLICY DELIBERATELY INDIFFERENT TO THE UNCONSTITUTIONAL USE OF DEADLY FORCE WAS THE MOVING FORCE OF PARKER'S INJURIES.

This Court has made clear that a municipality may not be held liable under 42 U.S.C. § 1983 "unless action pursuant to official municipal policy of some nature [has] caused a constitutional tort." *Monell, supra*, 436 U.S. at 691. In *Monell*, for example, a written municipal policy expressly directed the constitutional violation so that the necessary causal connection and municipal responsibility were easily established. By contrast, in cases in which there is no such express directive, establishing a causal link between the

[16] Indeed, the ruling of the majority that the District did not preserve its objection to the trial court's refusal to give the *Garner*-based instruction conflicts with a previous decision of that court in *Stewart v. Ford Motor Co.*, 553 F.2d 130 (D.C. Cir. 1977).

injury and the municipal policy, and attributing the injury to a decision of the municipality, are more difficult. However, the challenged policy must be "the moving force of the constitutional violation," and "but for causation . . . is never a sufficient condition for liability." *Oklahoma City v. Tuttle, supra*, 471 U.S. at 820 (plurality op.), quoting *Monell, supra*, 436 U.S. at 694; *id.* at 833 n.9 (Brennan, J., concurring). Furthermore, to establish municipal responsibility for the injury, the challenged policy must, at the very least, be deliberately indifferent to a substantial risk that a constitutional violation will occur.

In this case, the majority acknowledged this Court's decisions. It also purported to apply to the inadequate training claims (1) this Court's requirement that there be a causal connection and (2) the standard of "deliberate indifference" that has been adopted by the vast majority of the U. S. Courts of Appeals. Nevertheless, the majority ignored this Court's determination that a "but for" causal relationship between a municipal policy and injury is insufficient; and it failed to appreciate that the "deliberate indifference" standard, if it may be applied at all, must relate to a substantial risk of a constitutional tort.[17]

Significantly, the majority identified nothing infirm about the District's policy on the use of deadly force, its training in this respect, or Officer Hayes' understanding of this policy. On the contrary, the majority ruled that evidence respecting those matters was irrelevant—even though the jury was asked to decide whether the District's training policy in this respect caused a constitutional violation.

---

[17] Thus, the majority opinion speaks of "deliberate indifference manifest by systemic and grossly inadequate training, discipline, and supervision" (App. 6a); "deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided there is a causal connection between such inadequacies and *the risk of harm to others*" (App. 7a (emphasis added)); and "deliberate indifference to adequate training, supervision and discipline." App. 8a.

Instead, the majority upheld the verdict against the District by according an unrealistic measure of deference to the jury and by ruling that the jury could have found deficiencies in other supposed training, supervision, and disciplinary policies. Thus, for example, the majority ruled that the jury could have found that the evidence established that the District had inadequately trained its police officers about extrajurisdictional arrest authority and "disarmament training." App. at 9a.

The majority's analysis is wrong for several reasons. First, because the jury was not instructed on the issue of when deadly force may be used consistently with the Constitution, it is utterly hypothetical to suggest that the so-called deficiencies pinpointed by the majority were those on which the jury relied. On the contrary, here, as in *Tuttle*, "[t]here is no way to determine on which theory the jury relied." *Oklahoma City v. Tuttle*, 471 U.S. at 827 (Brennan, J., concurring). *Accord id.* at 821-22 (plurality op.). Furthermore, the majority failed to measure even the hypothetical jury findings of training, supervision, and disciplinary inadequacies against the causation requirement of *Monell* or the "deliberate indifference" standard. As a result, the majority has effectively read those limitations on liability out of the law.

**A. Extrajurisdictional Arrest Authority.**

The majority, relying on one of Parker's experts, reasoned that the District may be held liable for inadequately instructing its police officers about when they may make an arrest outside the District.[18] Even if there was inadequate

[18] As noted, this expert faulted a single memorandum prepared after the week-long ROP training session. In its opinion, the majority focused on this memorandum and ignored other evidence that members of the ROP were expressly instructed that they may execute a District felony warrant in Maryland. Furthermore, assuming, *arguendo*, that there was a gap in training on extrajurisdictional arrest authority, its significance is much less than that the majority gave it because District police officers are instructed to contact local law enforcement authorities whenever they reasonably expect to make an arrest outside the District.

training in this respect, however, the District may not be held liable in this case consistently with *Monell*.

For one thing, training in extrajurisdictional arrest authority has nothing to do with the use of deadly force. As a result, the deficiency identified by the majority cannot provide a basis for inferring that the District was deliberately indifferent to the unconstitutional use of deadly force, *i.e.*, that the deficiency, if there was one, was almost certain to cause the unconstitutional use of deadly force.

In addition, any deficient training in this respect cannot, as a matter of law, be deemed the moving force behind Parker's injuries. At worst, any deficiency simply caused Officer Hayes and his partner to refrain from arresting Parker in his home. It did not cause Officer Hayes to shoot Parker. On the contrary, Parker's decisions to flee and to attempt to hijack an innocent motorist's automobile broke any causal connection between any deficiency in training about extrajurisdictional arrest authority and Officer Hayes' decision to shoot.

The majority's ruling that there was a legally sufficient causal connection between training in arrest authority and Parker's injuries squarely conflicts with *Cameron v. City of Pontiac, Michigan*, 813 F.2d 782 (6th Cir. 1987). In *Cameron*, the court ruled that a felony suspect's decision to flee—there, in response to the police shooting at him—broke any causal connection between the shots preceding the suspect's flight and his death, which occurred when he ran onto a freeway and was struck by an automobile.

The causal connection here is even more attenuated. It cannot be said that Officer Hayes' failure to arrest Parker caused the injuries he sustained when he was shot. There is no affirmative link between the failure to arrest Parker and his injuries, in view of Parker's independent decisions to flee; to attempt to steal an automobile of an innocent passerby with the driver inside; and to respond to Officer Hayes' warning to "freeze" by reaching for his

waistband.[19] *See also Martinez v. California*, 444 U.S. 277, 280, 285 (1980)(In ruling that a murder committed by an unreasonably dangerous parolee was not cognizable under 42 U.S.C. § 1983, this Court explained that the murder was "too remote a consequence" of the decision to release the parolee, even if mistaken and "reckless.").

The majority found irrelevant the District's policy and training on the use of deadly force, Officer Hayes' understanding of this policy, and the circumstances that precipitated his decision to shoot. Indeed, the majority described as "background" the events immediately preceding the shooting, including Parker's choice of a felonious escape route and Officer Hayes' testimony that he believed that Parker was reaching for a gun. App. 3a. As a result, the majority has ruled that the District may be held liable under *Monell* for a police officer's decision to shoot (1) whenever hindsight reveals that imperfections in the District's training, on matters having nothing to do with when deadly force may be used, contributed to a "confused atmosphere;" (2) this "confused atmosphere" preceded an altercation between a police officer and a citizen; and (3) a police officer's split-second judgment turns out to be erroneous. App. 11a. This does not come close to satisfying *Monell*, and it defies common sense.

**B. Disarmament Training.**

The majority opinion also points to unspecified evidence of deficiencies in "disarmament training" and states, without explanation, that "it too illustrates deliberate indifference to *adequate training*." App. 9a (emphasis added). Its judgment is flawed in several respects. First, the evidence that was introduced by Parker does not support even its conclusion that the District's training was inadequate. Parker's

[19] At the moment that Parker attempted to hijack the automobile of the passing motorist, there can be no question that Officer Hayes knew that he had the power to arrest because he had probable cause to believe that Parker was in the process of committing felonies.

expert, Mr. McLaren, merely testified hypothetically: "assuming that [Officer Hayes] only had two 30-minute sessions in defensive tactics, disarmament tactics, disarming tactics, that would be inadequate." Mr. Bates, in turn, simply testified that Officer Hayes should have been able to subdue Parker at the outset of the altercation. Furthermore, the characterization of a training program as "inadequate" cannot support an inference of "deliberate indifference."[20] Finally, there was uncontradicted evidence that all MPD officers, including Officer Hayes, received extensive training in disarming tactics. See App. 37a-39a. This evidence not only rendered Mr. McLaren's hypothetical opinion irrelevant, but also established that there was no basis for inferring that the District's training in disarming tactics was deliberately indifferent to the unconstitutional use of deadly force. Accordingly, contrary to *Tuttle*, the majority permitted the District to be held liable solely because of the conduct of a single police officer on a single occasion (here, Officer Hayes' failure to subdue Parker). *See Oklahoma City v. Tuttle, supra*, 471 U.S. at 823-24 (plurality op.); *id.* at 833 (Brennan, J., concurring).

We add only two other observations. First, even if additional disarmament training may have made Officer Hayes significantly more likely to try to disarm Parker physically at the moment he believed that Parker was reaching for a gun, the failure to provide such training did not cause a violation of Parker's constitutional rights. Under *Garner*, if Officer Hayes reasonably believed that Parker posed an imminent threat of serious harm to himself or to the driver of the automobile, he was entitled to shoot as he did. This is so,

---

[20] At worst, a merely "inadequate" training program may permit an inference of negligence. In *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), however, this Court squarely held that "the Due Process Clause is simply not implicated by a *negligent* act . . . causing unintended loss of or injury to life, liberty, or property." *Daniels, supra*, 474 U.S. at 328 (emphasis in original).

even if there was also a possibility that Officer Hayes might have been able to subdue Parker by engaging in hand-to-hand combat.

Second, to the extent that the majority opinion requires the District (and any other government entity subject to liability for constitutional violations) to train its law enforcement officers that they may not use deadly force against a suspect who is believed to pose an imminent threat to their lives unless they attempt first to disarm the suspect by using physical force, the opinion exposes law enforcement officers (and innocent bystanders) to serious and unwarranted risks.[21] Here, for example, Parker admittedly knew that Officer Hayes was armed. As a result, any effort by Officer Hayes to disarm Parker by engaging in hand-to-hand combat could have caused serious harm not only to Officer Hayes but also to the innocent motorist. In such a struggle, Parker may have been able to secure and discharge Officer Hayes' service revolver, or it could have been discharged accidentally. Furthermore, had Parker himself been armed, as Officer Hayes believed, the risk of harm would have been multiplied.

Given these risks, no jurisdiction should be required, as a condition of avoiding section 1983 liability, to train its law enforcement officers to engage in hand-to-hand combat whenever they reasonably believe that a person poses a serious and imminent threat to themselves or to a third person. Training that may be appropriate for military personnel engaged in warfare should not be required of law enforcement officers engaged in the task of apprehending suspected felons. Nor should any police officer be forced to engage

---

[21] As this Court recognized in *Garner*, "a hand-to-hand struggle" between a criminal suspect and a police officer "necessarily" puts "at risk" "the safety of the arresting officer . . .." 471 U. S. at 14-15.

in hand-to-hand combat when a felony suspect ignores his lawful authority and appears to reach for a weapon.

**C. Other Flaws.**

The majority also pointed to Officer Hayes' physical condition and the District's failure to discipline him for the shooting. In its view, his physical condition may have disabled him from subduing Parker at the outset of the automobile altercation. However, even if Officer Hayes was not physically fit in every respect (but see App. 35a-37a), this flaw cannot establish liability under *Monell*. Evidence that one of the two police officers assigned to interview Mrs. Parker may not have been in peak physical condition does not establish a policy of any kind, much less a policy of deliberate indifference to the unconstitutional use of deadly force. Furthermore, even if Officer Hayes was in poor physical condition, and thus unable to subdue Parker at the outset of the altercation, his physical condition was not the moving force of Parker's injury—it did not impel Officer Hayes to shoot. Finally, the failure to discipline a single police officer for a single act cannot establish a *Monell* violation, particularly where, as here, the jury found that Officer Hayes did not use excessive or unreasonable force.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.[22]

---

[22] This Court has already granted certiorari in *Canton, Ohio v. Harris*, No. 86-1088 (argued Nov. 8, 1988), and in *Deshaney v. Winnebago County Dept. of Social Services*, No. 87-154 (argued Nov. 2, 1988). *Harris* presents the issue whether *Monell* liability can ever be imposed for an allegedly inadequate training policy not itself unconstitutional—in the context of a failure to render medical care to an arrestee. *Deshaney*, in turn, presents the question of the standard of liability necessary to establish a due process violation in the context of an allegedly reckless failure of a county welfare agency to protect a child from parental abuse.

If, in *Harris*, this Court should rule that an inadequate training policy, not itself unconstitutional, can never permit liability under 42 U.S.C.

[Footnote continued on next page]

Respectfully submitted,

FREDERICK D. COOKE, JR.
*Corporation Counsel, D.C.*

*CHARLES L. REISCHEL,
*Deputy Corporation Counsel, D.C.*
*Appellate Division*

DONNA M. MURASKY,
*Assistant Corporation Counsel, D.C.*

Attorneys for Petitioner
Room 305, District Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

---

[Footnote continued from previous page]
§ 1983, the judgment here could be vacated and the case remanded for reconsideration in light of that ruling. This Court could reasonably vacate and remand even though this petition presents two independent issues that warrant plenary review—the failure to give the *Garner* instruction and the ruling on Fed. R. Civ. P. 51.

If, on the other hand, this Court should decide that an inadequate training policy, not itself unconstitutional, may permit municipal liability in some circumstances, the decision here would still warrant review. *Harris and DeShaney* do not raise *Garner* or Rule 51 issues, and both cases involve liability in the context of protective obligations that a municipality may owe to its citizens. By contrast, this case involves the issue whether police training policies create unacceptable risks of constitutional violations. This case thus presents this Court with the opportunity to clarify the meaning of *Monell* and its progeny in the context of recurring and important law enforcement activity.